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OFFICE OF PETITIONS

In re Application of Carney	:	
Application No. 10/800,608	:	Decision on Petition
Filing Date: March 15, 2004	:	
For: Alfalfa Sprout Powder Based	:	
Supplement	:	

This is a decision on the petition under 37 CFR 1.137(a), filed October 24, 2006, to revive the above-identified application.

The petition is **DISMISSED**.

“[T]he question of whether an applicant’s delay in prosecuting an application was unavoidable must be decided on a case-by-case basis, taking all of the facts and circumstances into account.”¹ The general question asked by the Office is: “Did petitioner act as a reasonable and prudent person in relation to his most important business?”² A lack of knowledge of, or failure to understand, a PTO rule, the content of the MPEP, or an Official Gazette notice will not constitute unavoidable delay.³

The showing of record is not sufficient to establish to the satisfaction of the Commissioner that the delay was unavoidable within the meaning of 37 CFR 1.137(a).

Facts:

A non-final Office action was mailed January 13, 2006. The Office action set a shortened statutory period for reply of three (3) months.

¹ Smith v. Mossinghoff, 671 F.2d 533, 538, 213 U.S.P.Q. (BNA) 977 (1982).

² See In re Mattullath, 38 App. D.C. 497 (D.C. Cir. 1912).

³ See Smith v. Mossinghoff, 671 F.2d 533, 538, 213 U.S.P.Q. (BNA) 977 (Fed. Cir. 1982) (citing Potter v. Dann, 201 U.S.P.Q. (BNA) 574 (D. D.C. 1978) for the proposition that counsel’s nonawareness of PTO rules does not constitute “unavoidable” delay); Vincent v. Mossinghoff, 1985 U.S. Dist. LEXIS 23119, 13, 230 U.S.P.Q. (BNA) 621 (D. D.C. 1985) (Plaintiffs, through their counsel’s actions, or their own, must be held responsible for having noted the MPEP section and Official Gazette notices expressly stating that the certified mailing procedures outlined in 37 CFR 1.8(a) do not apply to continuation applications.) (Emphasis added).

On an unknown date, petitioner attempted to electronically file an amendment. The Office notes the amendment header lists a date of April 27, 2006.

Office records do not indicate receipt of a reply to the non-final Office action. As a result, the application became abandoned on April 14, 2006.

The petition states, "On or about February 2006, in a phone conversation with [the examiner], she requested an affidavit."

On an unknown date, petitioner began sending emails to Dr. Lawrence Rink, who had conducted a clinical trial related to the invention. Petitioner states Dr. Rink was out of the country and returned near the end of July of 2006. Petitioner subsequently filed a copy of the amendment and affidavit on July 28, 2006.

A Notice of Abandonment was mailed July 31, 2006.

A petition under 37 CFR 1.137(a) was filed August 8, 2006. The petition was dismissed on October 13, 2006. The instant petition was filed October 24, 2006.

Discussion:

The original amendment filed in response to the non-final Office action:

The petition fails to discuss the exact date the amendment was filed. However, the amendment header lists a date of April 27, 2006. A reply was due by April 13, 2006, absent payment for a one-month extension of time. Petitioner has failed to explain the reasons a request for a one-month extension of time was not filed.

Petitioner states the reply was submitted electronically but has not submitted any evidence, beyond the statement, to establish a reply was timely filed. The Office notes petitioner has not stated the date the reply was submitted. Petitioner has failed to establish petitioner's knowledge of the electronic filing system, and rules pertaining to the system. Petitioner has failed to discuss the exact steps taken by petitioner to ensure the amendment was properly transmitted. Petitioner has failed to discuss reasons an additional copy of the papers was not sent by mail or facsimile transmission when petitioner failed to receive any verification of receipt of the electronic submission from the Office.

A reasonable and prudent person, unfamiliar with electronic filing practice, would have filed papers or fees in compliance with 37 CFR 1.8 or 1.10 to ensure their timely filing in the PTO, as well as preserve adequate evidence of such filing, a delay caused by an applicant's failure to file papers or fees in compliance with 37 CFR 1.8 and 1.10 does not constitute "unavoidable" delay.⁴

⁴ "The procedures set out in the PTO's regulations are designed to provide the type of direct evidence needed to prove when and to where a lost amendment [or other paper] was sent. Had plaintiff's counsel followed these procedures, as a 'prudent and careful man' would have done in conducting 'his most important business,' then he would have been able to provide sufficient evidence to support a showing of unavoidable delay." Krahn v. Commissioner of Patents and Trademarks, 15 U.S.P.Q.2d (BNA) 1823 (E.D. Va. 1990).

The affidavit:

Petitioner has failed to establish a proper reply, such as a proper amendment, could not be filed in response to the non-final Office action without including the affidavit. The fact the affidavit could have improved the value of the reply does not prove a reply could not have been filed without the affidavit. Petitioner has not shown he was unable to file any reply to prevent the application from becoming abandoned.

Petitioner has failed to fully discuss dates he attempted to contact Rink. Petitioner has failed to discuss reasons Rink was unable to send a signed affidavit to petitioner via facsimile transmission, mail, or other method.

The request for reconsideration states petitioner did not obtain a signed affidavit from Rink until the end of July of 2006. However, the affidavit was signed by Rink on April 4, 2006. Petitioner has failed to explain the reason the affidavit could not have been filed during April of 2006. The Office notes a timely reply could have been filed, with a request for a three-month extension of time, as late as July 13, 2006.

The request for reconsideration fails to prove the delay in the submission of a proper reply was unavoidable.

Petitioner may wish to consider filing a petition to revive based on unintentional abandonment under 37 CFR 1.137(b). A grantable petition pursuant to 37 CFR 1.137(b) must be accompanied by the required reply (already submitted), the required petition fee (\$750 for a small entity), and a statement that the **entire** delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional. A copy of a blank petition form is enclosed for petitioner's convenience.

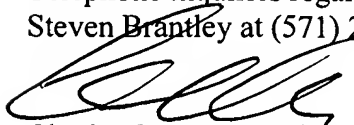
Any request for reconsideration must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petition
 Commissioner for Patents
 P.O. Box 1450
 Alexandria, VA 22313-1450

By facsimile: (571) 273-8300
 Attn: Office of Petitions

Telephone inquiries regarding this communication should be directed to Petitions Attorney Steven Brantley at (571) 272-3203.



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